

STATE OF MICHIGAN
COURT OF APPEALS

SHACKET DEVELOPMENTS, INC.,

Plaintiff-Appellee/Cross-Appellant,

and

GERALDINE SHACKET, ROBERT SHACKET
and FENTON LAND DEVELOPMENT,

Plaintiffs/Counterdefendants-Cross-
Appellants

V

SANTOKH LABANA, LORRAINE LABANA,
CBK DEVELOPMENT, INC., and LABANA
MANAGEMENT COMPANY,

Defendants-Appellants/Cross-
Appellees,

and

FENTON HILL LAND COMPANY,

Defendant/Counterplaintiff-Cross-
Appellee,

and

ROBERT PORTEOUS

Defendant/Cross-Appellee,

and

NORTH POINTE PARTNERS,

Defendant.

UNPUBLISHED
February 28, 2003

No. 237232
Wayne Circuit Court
LC No. 98-835771-CK

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Defendants appeal as of right an order of final judgment in favor of plaintiff. Plaintiff cross-appeals on the issue of the proper calculation of damages. We affirm.

I. Liability

Defendants argue that, in this bench trial, the trial court erred in finding that the parties had a fifty/fifty partnership agreement. We disagree. Whether a partnership exists is a question of fact, and this Court reviews a trial court's findings of fact in a bench trial for clear error and conducts a review de novo of the court's conclusions of law. MCR 2.613(C); *Byker v Mannes*, 465 Mich 637, 644; 641 NW2d 210 (2002); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). We will find clear error when, although there is evidence to support the finding, our review of the entire record leads us to conclude, definitively and conclusively, that the trial court is mistaken. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

A partnership exists if the persons “intentionally acted as co-owners of a business for profit.” *Byker, supra*, 465 Mich 644. A partnership is defined as “as an association of 2 or more persons . . . to carry on as co-owners of a business for profit.” MCL 449.(6)(1); *Byker, supra*, 465 Mich 644. The burden of establishing the existence of a partnership is on the party claiming the partnership. *Brown v Frankenmuth Mut Ins Co*, 187 Mich App 375, 381; 468 NW2d 243 (1991). The fact that an existing partner is deceased raises the burden of proof. *Miller v City Bank & Trust Co*, 82 Mich App 120, 124; 266 NW2d 687 (1978).

Our review of the trial court record leads us to conclude that the parties' conduct sufficiently established an intent to act as co-owners and, therefore, the trial court's findings are not erroneous. Plaintiff contributed its experience to the project in more than an advisory or consulting capacity. Specifically, plaintiff obtained aerial photographs for the project, completed the site plan application, attended planning commission meetings, applied for a DNR wetlands permit and submitted the master sewer plan in its name. Plaintiff also applied for a special land use application. “[P]artnership is legal entity separate from the individuals composing it and its essential elements are their contribution to it of whatsoever nature, whether capital, consisting of money, merchandise, et cetera, or credit, skill or labor.” *Employment Security Comm v Crane*, 334 Mich 411, 416; 54 NW2d 616 (1952).

In addition to its name and experience, plaintiff incurred contractual liabilities, paid for expenses related to the project, and entered contracts with outside vendors. “Right of management, such as the authority to enter contracts, is indicia of the existence of a partnership.” *Falkner v Falkner*, 24 Mich App 633, 643; 180 NW2d 491 (1970).

Considering the entire factual record, as well as the trial court's unique position to judge the credibility of the testifying witnesses, this Court is not left with a definite and firm conviction that the trial judge erred. Accordingly, the trial court's finding that the parties were fifty/fifty partners is not clearly erroneous. *Byker, supra*, 465 Mich 644; *Walters, supra*, 239 Mich App 453.

II. Damages

Defendants also say that the trial court erred when it failed to include land development costs incurred by defendants, for the period between 1993 and 1999, when the trial court calculated net profits. We note that defendants presented a different schedule of costs in their proposed findings of fact than in their subsequent motion to amend the judgment. Moreover, defendants failed to present any evidence that they personally, not North Pointe Partners, incurred land costs between 1993 and 1999. Consequently, we conclude the trial court did not err when it excluded the land costs incurred after 1992. *Walters, supra*, 239 Mich App 453.

III. Plaintiff's Cross-Appeal

On cross-appeal, plaintiff argues that the trial court erred when it calculated plaintiff's damages because: (1) the trial court understated the amount of damages, and (2) plaintiff is entitled to all the partnership profits less defendants' interest.

Plaintiff correctly asserts that MCL 449.38(2)(a)(II) explicitly provides that when "dissolution is caused in contravention of the partnership agreement, each partner who has not wrongfully caused dissolution has a right to damages for breach of the agreement against each partner who wrongfully caused the dissolution." *Brooks v Rose*, 191 Mich App 565, 571; 478 NW2d 731 (1991). This Court has held that an aggrieved partner is limited to a contractual remedy for breach of fiduciary duty. The purpose of compensatory damages is to make the injured party whole for the losses actually suffered, and the amount of recovery for such damages is inherently limited by the amount of the loss. *Stillson v Gibbs*, 53 Mich 280, 284; 18 NW 815 (1884); 22 Am Jur 2d, Damages, § 27, pp 54-56; 4 Restatement Torts, 2d, §§ 903, 906, 908, pp 453, 460, 464.

In *Gilroy v Conway*, 151 Mich App 628; 391 NW2d 419 (1986), this Court further observed that Michigan cases that have involved "a partner's breach of the fiduciary duty to other partners have been concerned solely with placing the wronged partners in the economic position that they would have enjoyed but for the breach." *Id.* at 637-638, citing *Van Stee v Ransford*, 346 Mich 116, 130; 77 NW2d 346 (1956); *Penner v Denike*, 288 Mich 488, 492; 285 NW 33 (1939); *Lynn v Arehart*, 231 Mich 144, 147; 203 NW 834 (1925).

Our review of the record reveals that plaintiff was not without fault in this matter. At trial, testimony indicated that plaintiff halted all activity on the project after Al Shacket's death, and thus, Robert Porteous felt the need to protect defendants. While it is unclear to what extent the trial court may have relied on this aspect of Porteous' testimony, in light of the inconsistencies in Robert Shacket's testimony, and plaintiff's possible breach in halting the development, the trial court concluded that both sides had credibility problems. We also note that the financial information presented to the trial judge was not definitive regarding gross profits. The trial court fashioned an appropriate remedy to allow plaintiff to be made whole on the facts of the case. *Gilroy, supra*, 151 Mich App 637-638. Accordingly, this Court is not left with a definite and firm conviction that the trial judge mistakenly calculated damages. Therefore, the trial court's findings are not clearly erroneous. *Walters, supra*, 239 Mich App 453; *Gilroy, supra*, 151 Mich App 637-638.

Affirmed.

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette